

**Delta Stewardship Council
Workshop on Delta Plan
March 11, 2011**

Panel C: Reduce Risks to People, Property, and State Interests in the Delta

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You asked for top priorities to reduce risks to people, property, and state interests in the Delta. The other panelists, who are experts, have proposed such priorities and related strategies. With your permission, I will address a related, foundational question. *How should the Council assure effective and timely implementation of such strategies adopted in the Delta Plan, mindful that many will involve other agencies?*

1. The Council is the new driver in the Delta's regulatory crowd.
 - Delta Reform Act calls for “new governance structure with the authority, responsibility, accountability, scientific support,” and funding to achieve the co-equal goals. WC 85020(h). This is based on the finding that resolving the Delta crisis “requires fundamental reorganization of the state’s management” of these resources. WC 85001(a).
 - The Council will adopt and implement a Delta Plan as the first “comprehensive, long-term management plan” to achieve co-equal goals. WC 85059.
 - However, the 2009 statute reserves authorities of other state agencies under Water Code, Fish and Game Code, Public Resources Code, and other laws. WC 85032. These agencies will continue to adopt plans and issue permits under their existing authorities.
 - How should the Council best direct or motivate other agencies to implement the Delta Plan’s strategies as necessary for timely achievement of the co-equal goals?
2. Consistency determinations will reach some, but not all, of the activities that affect achievement of co-equal goals.
 - Council will provide appellate review for another agency’s determination that a covered activity is consistent with the Delta Plan.
 - According to the definition, a covered activity subject to such review: (i) occurs within the Delta or Suisun Marsh; (ii) is carried out, approved or funded by a

state or local agency; and (iii) will have a significant effect on co-equal goals or flood control programs. WC 85057.5(a).

- The scope of consistency review under this definition is complex and somewhat unclear.
- In my opinion, consistency review plainly applies to: (i) a decision by a state or local agency to fund or implement an activity, and (ii) a permit by a local agency to conduct an activity.
- Consistency review excludes routine O&M of the State Water Project, federal Central Valley Project, or any facility owned or operated by a local agency (e.g., levees). WC 85057.5(b)(2), (5).
- Another important exception is “a regulatory action by a state agency.” WC 85057.5(b)(1). Under general law, regulatory action is either: (i) a permit to conduct an activity, or (ii) a plan, order, or standard of general applicability subject to the Administrative Procedure Act. “What is a Regulation?”, http://www.oal.ca.gov/res/docs/pdf/What_Is_a_regulation.pdf.
- A related exception from consistency review is a regulatory action by a federal agency.

3. The Delta Plan may incorporate plans prepared by other agencies. However, by virtue of such incorporation alone, it will not create new rights or claims to enforce those plans, and specifically, the obligations of other agencies.

- Under the Delta Reform Act, the Council may incorporate a wide variety of plans prepared by other agencies into the Delta Plan. These include: proposal for coordinating water supply and flood control (WC 85309), local flood plans (WC 85307(b)), Bay Delta Conservation Plan (WC 85320), and the Delta Protection Commission’s economic development and sustainability proposal (WC 85301(d)).
- How will such incorporation affect accountability for performance?
- An incorporated plan, as an element of the Delta Plan, will be a basis for the Council’s consistency review for any covered action subject to such review.
- The Delta Reform Act does not appear to create new rights or claims to enforce these other plans following incorporation. See, e.g., WC 85322 (BDGP).

4. The Council should seek adoption of the Delta Plan under the Clean Water Act and other applicable laws, for the purpose of assuring cooperative implementation by other agencies.
 - The Delta Plan will be developed in a manner which is consistent with certain federal laws, including the Clean Water Act (CWA). WC 85300(d).
 - The Council should seek adoption of the Delta Plan under those federal laws as appropriate to enhance cooperative implementation by federal, state, and local agencies.
 - For example, if the State Water Board adopted the Delta Plan as an element of the Bay-Delta Water Quality Control Plan under CWA 303(c), then appropriate strategies and performance metrics will become binding requirements for discharge permits (CWA 402), water quality certifications (CWA 401(a)), and dredge-and-fill permits (CWA 404) in the Delta.
5. The Council should enter into binding agreements with other agencies specifying how they will assist in implementing specific strategies in the Delta Plan.
 - The Council will establish and oversee a committee of agencies responsible for implementing the Delta Plan. WC 85204.
 - The Council should enter into agreement with each such agency, specifying how that agency will use its authority to implement the Delta Plan. Such agreement should be legally binding – for example, via adoption in that agency’s own plan.
 - In sum, there are many stressors that threaten the Delta’s ecosystem, water supply reliability, and the safety and security of people, property, and other state interests. Generally, there are many agencies regulating each stressor. The Delta Plan should be crystal-clear which agency has what responsibility for each strategy or action, and it should include appropriate assurances (such as those above) that the agency is obliged to timely fulfill that responsibility.

For further information

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